Dreyer's Grand Ice Cream, Inc. d/b/a Edy's Grand Ice Cream *and* United Food and Commercial Workers Union, Local 700, a/w United Food and Commercial Workers International Union, AFL–CIO–CLC. Cases 25–CA–23065, 25–CA–23141, 25–CA–23374, and 25–CA–23536

May 9, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On September 12, 1996, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions, a supporting brief and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Dreyer's Grand Ice Cream, Inc. d/b/a Edy's Grand Ice Cream, Fort Wayne, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(e).

"(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees, suspend employees, remove employees from the Organization Review Board (ORB) or otherwise discriminate against any employee for supporting United Food and Commercial Workers Union, Local 700 a/w United Food and Commercial Workers International Union, AFL–CIO–CLC, or any other union.

WE WILL NOT coercively interrogate employees about their union support, union sentiment, or union activities.

WE WILL NOT instruct employees to quit their employment because they support Local 700 or any other union.

WE WILL NOT tell employees that they have been suspended from membership on the ORB or any other plant committee because they supported Local 700 or any other union, or that we are not supporting their reinstatement to the ORB or any other plant committee because they supported Local 700 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Joe Troendly, Steve Leatherman, Robert Byanski, Lois Jones, and Amy Wickensheimer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Joe Troendly, Steve Leatherman, Robert Byanski, Lois Jones, and Amy Wickensheimer

[1] No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by instructing employees to quit their employment because they supported the Union; by interrogating employees about their union membership, union activities, and prounion sentiment; by telling the employees that they have been suspended from the Respondent's Organization Review Board (ORB) because of their union membership, union activities, and prounion sentiment; and by informing employees that the Respondent did not support their return to the ORB because of their union membership, union activities, and prounion sentiment. No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(1) and (3) of the Act by removing employees Michael Alexander, Ronald Palmer, Steve Shlater, and Amy Wickensheimer from the ORB.

Further, no exceptions were filed to the judge's finding that the Respondent did not violate Sec. 8(a)(1), (3), and (4) of the Act by issuing a disciplinary report to employee Michelle McGuire and suspending Wickensheimer; and that the Respondent did not violate Sec. 8(a)(4) by discharging Wickensheimer.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule a judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order to conform to the Board's standard narrow cease-and-desist language for respondent employers. We shall also issue a new notice to employees.

whole for any loss of earnings and other benefits suffered as a result of the actions against them, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the suspension and discharge of Robert Byanski and any reference to the unlawful discharges of Joe Troendly, Steve Leatherman, Lois Jones, and Amy Wickensheimer and WE WILL, within 3 days thereafter, notify each of them, in writing, that this has been done and that these personnel actions will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, issue a written announcement to you stating that we have no objection to the election of employees Michael Alexander, Ronald Palmer, Steve Shlater, Joe Troendly, and Amy Wickensheimer to the ORB and delete from our files any reference to their removal from the ORB, and WE WILL, within 3 days thereafter, notify each of them, in writing, that this has been done and that their removal from the ORB will not be used against them in any way.

DREYER'S GRAND ICE CREAM, INC.
D/B/A EDY'S GRAND ICE CREAM

Walter Steele and *Michael Beck, Esqs.*, for the General Counsel.
Gregory D. Wolflick, Esq. (Wolflick & Simpson), of Glendale, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Fort Wayne, Indiana, on January 29, 30, and 31, and on February 1, all in 1996. Upon charges filed on March 8, 1994, in Case 25–CA–23065, and in Case 25–CA–23141 on April 11, 1994, which was thereafter amended, by the Union, United Food and Commercial Workers Union, Local 700, a/w United Food and Commercial Workers International Union, AFL–CIO–CLC, the Regional Director for Region 25 issued an order consolidating cases, consolidated complaint and notice of hearing on June 22, 1994, against the Respondent, Dreyer's Grand Ice Cream, Inc. d/b/a Edy's Grand Ice Cream (Edy). Upon a further charge filed by the Union in Case 25–CA–23374 on August 4, 1994, the Regional Director issued a second order consolidating cases, consolidated complaint and notice of hearing against Edy on September 23, 1994. Finally, upon a charge filed by the Union in Case 25–CA–23536 on October 24, 1994, and amended on November 8, 1994,[1] and March 14, 1995, the Regional Director issued a third order consolidating cases, consolidated complaint and notice of hearing. This final consolidated complaint alleges that Edy has violated Section 8(a)(4), (3), and (1) of the National Labor Relations Act (the Act). By its answers to the consolidated complaints, Edy has denied those allegations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Edy, I make the following

FINDINGS OF FACT

I. JURISDICTION

Edy, a corporation, produces and sells ice cream and frozen dessert products at its facility in Fort Wayne, Indiana. During the 12 months preceding issuance of the final consolidated complaint, Edy, in conducting its business, sold and shipped goods valued in excess of $50,000 directly to points outside the State of Indiana. Edy admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

Edy's Fort Wayne facility consists of one manufacturing site and a leased distribution center. Since November 1989, when Kirk A. Raymond became Edy's Fort Wayne plant manager, he has been striving to implement a self-directed team system at that site. Under that system, Raymond has organized the plant into business units. Each business unit is vertically integrated so that it handles an entire production line, from unloading deliveries to shipping on a three-shift, 24-hour basis. A business unit consists of three teams of 8 to 12 employees each. From 1989 until 1994 or 1995, there were three business units. At that point, Raymond expanded his operation to six business units employing approximately 140 team members. Currently, Edy's Ft. Wayne plant employs approximately 190 full-time team members.

Raymond and Edy hope that team members acting through committees will make all the business decisions for the plant and thus eliminate the need for traditional managers. According to Raymond, his ultimate goal is to establish "a system whereby everyone in our system is a manager." He also testified that the Fort Wayne plant is "in an evolving process."

Since their inception, each team has been holding regularly scheduled meetings at which matters pertaining to their day-to-day operations and other relevant concerns are discussed and resolved. Team members are also expected to belong to one or more plant committees, including the good practice committee, the interview committee, the health and wellness committee, the activities committee, the Organization Review Board, the pride committee, and an incentive task force. Team members can volunteer for membership on some of the committees. However, each team selects one of its members to represent it on the organization review board, referred to below as ORB.

Each committee or task force deals with a specific management area of concern. The good practice committee responds to requests from business groups, teams or individuals for examination of plant policies governing attendance, vacations or other matters of a regulatory nature. The interview committee interviews prospective employees or team members as required. The health and wellness committee is

[1] Henceforth, unless otherwise stated, all dates occurred in 1994.

an expanded safety committee which also concerns itself with the overall health and physical well-being of the plant. The activities committee administers parties and other social events. ORB recommends disciplinary action against team members found to have violated plant rules or policies. The pride committee is concerned with maintaining and improving the attitude and morale of team members. The incentive task force reviews Edy's incentive program to make sure that it is achieving business results and is fair to team members.

A member of the Ft. Wayne plant's management team, referred to as the M-team, sits on each committee. Also, each of the six business units has an M-team member assigned to it. An M-team member is present at 80 percent of the bi-weekly regular team meetings. At all times material to these cases, the M-team included the following: Production Manager Scott West, Plant Engineer Dave Steinman, Shipping Area Manager Jeff Black, Technical Operations Manager Peter Hunter, Director of Education John Williams, Quality Systems Manager Eric Dick, Supervisor Walter J. Neuenschwander, and Accountant Fred Andriano. Either in its answers, or by stipulation at the hearing, Edy has admitted that the listed members of the M-team are supervisors within the meaning of Section 2(11) of the Act.[2] In his testimony before me, Plant Manager Kirk Raymond conceded that under his and Edy's current policy at the Fort Wayne plant, supervisory duties are shared on a 50-50 basis between the M-team and the teams.

The Union's effort to organize the employees at Edy's Fort Wayne plant began in August or September 1993. In a letter to Edy, dated December 27, 1993, the Union announced the formation of an organizing committee and listed 32 Fort Wayne employees as committee members. Thereafter, the Union petitioned for a Board-conducted representation election in a unit of Edy's Fort Wayne plant employees. In the election, held on March 17, the Union failed to obtain a majority. Four days later, Plant Manager Raymond issued a letter to all team members at the Fort Wayne plant, which began with: "Congratulations and thank you to all of you who voted 'no' to preserve our team system. Now we can finally get back to business and start moving forward." In the next paragraph, Raymond commented:

> I am, however, very disturbed by comments from some team members who believe that this experience was in some way good for us. So that there are no misconceptions—*this experience was extremely bad for us and one we should not repeat*!

Raymond's testimony before me reflected greater hostility than he had expressed in the underlined bold type in his letter to his employees. He admitted that he did not want his employees to engage in union activity again. Further, he admitted that in his view a supervisor or anybody who engaged in union activity was engaging in the equivalent of stealing from the Company or punching somebody out. Continuing, Raymond admitted that he viewed stealing from the company or punching someone out as "offenses . . . for which one could be discharged without warning."

The issues raised in these cases are whether Edy responded to its employees' union activity by violating the Act as follows:

1. Section 8(a)(1), by: [3]

(a) Instructing its employees to quit their employment because they supported the Union.

(b) Interrogating employees about their union membership, activities, and sympathies and the union membership, activities and sympathies of other employees.

(c) Telling employees that they were suspended from the ORB because of their union membership, activities and sympathies.

(d) Telling employees that Edy did not support their return to the ORB because of their union membership, activities and sympathies.

2. Section 8(a)(3) and (1), by:[4]

(a) Issuing a disciplinary incident report to Michelle McGuire.

(b) Suspending Robert Byanski.

(c) Discharging Joe Troendly, Steve Leatherman, Robert Byanski, and Lois Jones.

(d) Removing employees Michael Alexander, Ronald Palmer, Steve Shlater, Joe Troendly and Amy Wickensheimer from the ORB.

(e) Suspending and then discharging employee Amy Wickensheimer.

3. Section 8(a)(4) and (1), by:[5]

(a) Issuing a disciplinary incident report to Michelle McGuire.

(b) Suspending and then discharging employee Amy Wickensheimer.

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[2] Sec. 2(11) of the Act provides:

Sec. 2. When used in this Act—

. . . .

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement.

[3] Sec. 8(a)(1) of the Act provides:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

In pertinent part, Sec. 7 of the Act declares:

Employees shall the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

[4] Sec. 8(a)(3) of the Act, in pertinent part, protects employees as follows.

(a) It shall be an unfair labor practice for an employer—

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

[5] Sec. 8(a)(4) of the Act makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."

B. *Michele McGuire's Disciplinary Incident Report*

1. The facts

Michele McGuire began working at Edy's Fort Wayne plant on October 29, 1990, as a production employee. McGuire began as a team member, and after a few months began serving on the plant's good manufacturing practices committee. Later, she was on the interview committee, which screens and recommends potential employees for hire or rejection.

In 1993, McGuire was involved in the Union's organizing campaign. She attended union meetings and served on its organizing committee. McGuire's name was misspelled in the Union's letter of December 27, 1993, advising Edy of the employees on the organizing committee. However, at the hearing, Edy stipulated that her name was listed in that letter.

On February 9, McGuire received a subpoena to testify at the representation hearing scheduled for the following day. The Union subpoenaed her to testify about temporary employees at the Fort Wayne plant.

McGuire contacted her team coordinator, Tim Laughlin, told him about the subpoena, and said that she would be absent from work on February 10 for an unknown duration. She offered to work from 5 until 9 a.m. on that day. Laughlin agreed to cover her.

On February 10, after working at the Fort Wayne plant from 5 to 9 a.m., McGuire went to the representation hearing scheduled to begin at 10 a.m. The day's hearing ended at 12:30 p.m. and was scheduled to resume on February 18. However, the Union's attorney asked McGuire to remain and meet with him to prepare for the resumed hearing. When she asked if the subpoena required her presence at the meeting, the Union's attorney said it did. The meeting took place at a Holiday Inn during lunch, and ended at 2:30 p.m., 30 minutes before McGuire's shift ended at Edy's plant. She went home.

McGuire attempted unsuccessfully to contact Tim Laughlin on the evening of February 10 to advise him of the hearing's resumption on February 18 and her expectation that she would receive another subpoena to testify at that hearing. She spoke to Laughlin at the plant on the following day and learned from him that she was scheduled off on February 18.[6]

I find from the testimony of Stacey Dawalt, a member of McGuire's team, that on February 10, Laughlin told him that McGuire would be absent that day because she had been subpoenaed to attend a Board hearing. Laughlin also remarked that the team had to cover for her while she was at the hearing. As the team was short an additional member on that day, Dawalt performed his own duty and McGuire's. He found this a difficult task.

At about 12:30 p.m. that same day, Dawalt noticed that other employees who had been subpoenaed to attend the Board hearing had returned to work, and that McGuire had not. Dawalt approached Director of Education John Williams, a supervisor, and M-team member, and inquired about McGuire. Williams said he understood that McGuire would return to work after she had satisfied the subpoena.

Dawalt went to the other team members and complained that McGuire should have returned to the plant and resumed her shift, which ended at 3:30 p.m. The other team members agreed with Dawalt. At Dawalt's insistence and with John Williams approval, the matter was raised at the next team meeting.

At the next team meeting, on February 15, Dawalt asked McGuire how she had accounted for her lost time on February 10. McGuire, by seeking and obtaining someone to cover for her on that day, had tried to avoid an attendance incident, which, if repeated five more times would incur a verbal warning. She explained that she had not marked it because she had obtained coverage. McGuire, as personnel administrator for her team, was responsible for maintaining her team's attendance records.

The meeting continued with team member Wanda Dabe asking to see McGuire's subpoena. When McGuire presented the subpoena, Dabe and Supervisor Williams had some discussion. Dabe expressed her opinion that McGuire's subpoena was "for personal business" and, thus, not covered under Edy's policy. Williams listened and said nothing.

During the meeting, McGuire fully accounted for her absence on February 10. She explained that the hearing had been called off for that day at about 12:30 p.m., and postponed until February 18. McGuire also disclosed that she had conferred with the Union's attorney at the Holiday Inn until 2:30 p.m., and then had gone home.

The policy Dabe referred to, appears at page 16 of Edy's employee handbook, which was in effect at all times material to these case. That portion of the handbook granted "civic leave" for any time required to serve as a witness "except in connection with personal business." The same handbook directed employees to notify his or her "manager or supervisor immediately."

Williams, who was present when Dabe presented her opinion, did not express disagreement with it. Tim Laughlin told the team that he had covered McGuire for the duration of her shift and that she had not limited her absence to only a portion of her shift. The team, with Williams fully participating in the discussion, imposed a sick incident on McGuire's attendance record.

I find from Dawalt's testimony that the team imposed the incident on McGuire not because she honored the Union's subpoena, but because she remained away from work after 12:30 p.m. when the hearing was postponed.

At her next team meeting, 1 week later, McGuire protested that she should not have received an incident for her absence on February 10 because she had obtained coverage from Tim Laughlin, her coordinator. The team sent the matter to the good practices committee, which changed the incident to a "leave early" incident.[7]

2. Analysis and conclusions

The General Counsel argues that McGuire's union activity and participation as a witness in the representation proceeding scheduled for February 10 motivated Edy to issue a disciplinary incident report to her on February 15. Edy contends that McGuire was not covered by Section 8(a)(4) of the Act

[6] My findings of fact regarding McGuire's employment and her conduct in response to the subpoena are based upon her uncontradicted testimony.

[7] My findings of fact regarding the imposition of the incident on McGuire are based on her uncontradicted testimony and that of team member Stacey Dawalt.

when she met with the Union's attorney after the hearing was postponed, and that her failure to return to work after 12:30 p.m. on February 10 motivated her team to punish her. I agree with Edy's position.

There is much in this record to suggest that Edy knew of, and was displeased by, McGuire's participation in the Union's organizing effort. The Union misspelled her surname in its letter of December 27, 1993. However, at the hearing before me, Edy agreed that McGuire's name was on that letter. Plant Manager Kirk's letter of March 21 and his testimony show that he was alert to the Union's campaign and was hostile to it and to any employee who engaged in union activity. I find it likely that John Williams, one of Kirk's lieutenants, followed Kirk's lead with respect to the Union's organizing campaign.

The record also shows that it was likely that McGuire's support for the Union provoked Edy's management. As found below, Peter Hunter showed his hostility toward the Union by coercively interrogating employee Troendly about his union sentiment. Further, as found below, Shipping Area Manager Jeff Black and Accountant Fred Andriano manifested their antiunion sentiment by resorting to unlawfully coercive conduct and discrimination designed to discourage employees from supporting the Union. Also, as found below, Plant Manager Raymond unlawfully terminated Lois Jones in April in reprisal for her union activity.

The arrival of the subpoena summoning McGuire to a Board hearing on the Union's election petition provided her with another opportunity to assist the Union's cause. Here was another possible provocation for her superiors.

However, the record shows that it was McGuire's team member Stacey Dawalt, not management, who sparkplugged the team action. On the afternoon of February 10, he noticed that all the subpoenaed employees except McGuire had returned to work by 12:30 p.m. He found himself overburdened with his and McGuire's work. He resented her apparent indifference to her obligation to return to her team once the hearing was over.

Dawalt asked for an explanation to be obtained from McGuire at a team meeting on February 15. McGuire's explanation included an admission that the hearing covered by her subpoena was postponed at 12:30 p.m. on February 10, and that she elected to accompany the union attorney and converse with him until 2:30 p.m., and then go home. Thus did she show Dawalt and the rest of the team that after 12:30 p.m. on February 10, she was on personal business.

There has been no showing that management provoked Dawalt or the team into punishing McGuire. Nor has there been any showing that any other employee who absented himself or herself from the plant beyond the time covered by a subpoena, with management's knowledge, escaped disciplinary action.

In sum, I find that the General Counsel has failed to show by a preponderence of the evidence that Michele McGuire suffered discipline because she had attended a Board hearing or had otherwise engaged in conduct protected by the Act. Nor has the General Counsel shown by adequate proof that Edy's antiunion sentiment played any part in the decision to impose a "leave early" incident upon employee Michele McGuire. Accordingly, I shall recommend dismissal of the allegation that Edy discriminated against her in violation of Section 8(a)(4), (3), and (1) of the Act. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

C. *Removal of Employees from the ORB*

1. The facts

a. *Michael Alexander*

Michael Alexander's employment at Edy's Ft Wayne plant began on November 4, 1985, as one of the original Ft. Wayne employees. He began working in the mix department and was a member of a team. Alexander volunteered to be on the ORB, where he served for approximately 1-1/2. The ORB consisted of two members from each team and one member of the M-team. Then, as now, the ORB met when a disciplinary problem required its attention. Alexander resigned from the ORB to give another employee an opportunity to serve on it. In 1992 or 1993, his team reappointed him to the ORB. He remained a member of the ORB until on or about March 24.

Alexander involved himself in the Union's organizing committee at Edy's Ft. Wayne plant. The Union's letter of December 27 to Edy listed him as a member of that committee.

One week after the Board-held representation election at Edy's Ft. Wayne plant, Michael Alexander arrived a bit early for an ORB meeting. An administrative employee, Pat Sanderson, confronted Alexander and suggested that Alexander should not be attending the meeting and should leave. Alexander attempted to obtain an explanation from Sanderson, who again insisted that he leave. Alexander refused to leave until given a "good reason to."

An M-team member, Accountant Fred Andriano, arrived as Alexander was seeking an explanation from Sanderson. Andriano ordered Alexander to step outside in the hallway. When Alexander stepped into the hall, Andriano declared that Alexander was suspended from the ORB until the next team meeting, when there would be a discussion of Alexander's membership on the ORB. However, Andriano neglected to explain why he had suspended Alexander.

Prior to the next team meeting, Alexander met with a member of his team who reported that Edy wanted to streamline committees due to the increase in overtime and the difficulty in covering work assignments. In further discussion, Alexander said he would seek membership in another committee. He never returned to the ORB.[8]

b. *Ronald Palmer*

Ronald Palmer, an employee at Edy's Ft. Wayne plant for the past 7 years, became a member of the ORB in December 1992 or January 1993. In August or September 1993, Palmer began attending union meetings and volunteered to be on its organizing committee at his workplace. The Union included Palmer's name in its letter of December 27, 1993, to Edy.

In early April, approximately 3 weeks after the Board-conducted representation election, Palmer went to an ORB meeting. At the outset, a discussion centering on Palmer's membership on the ORB began. Coordinator Dave Clark, an employee-member of the ORB raised the matter. I find from

[8] I based my findings regarding Michael Alexander's suspension from the ORB on his credible testimony, which was uncontradicted.

Palmer's uncontradicted testimony, that Clark said that there was a move afoot to create an opening by removing Palmer from the ORB, mainly because of "what had been going on in the Company for the last year, nine months or so." A second employee, Wanda Dabe, agreed that Palmer should be removed from the ORB. No member of the ORB spoke up on Palmer's behalf.

M-team member Fred Andriano was present at the ORB meeting when Clark and Dabe made their remarks about removing Palmer. During the same discussion, Andriano remarked, in substance, that Palmer's membership on the ORB presented a "trust problem."

Palmer resisted the suggestion that he withdraw from the ORB. However, the consensus supported his removal and voted to remove him immediately. Palmer has not been reinstated to his membership on the ORB.[9]

c. *Stephen Shlater*

Stephen Shlater was employed as a production team member at Edy's Fort Wayne plant from June 1989, until he quit in June 1994. After selecting Shlater for the good practices committee, his team selected him for the ORB. When Shlater quit his employment at Edy, he had been on the ORB for somewhere between 8 months and 1 year. During that time, Shlater observed that a succession of three different M-team members attended ORB meetings.

Late in 1993, Shlater learned of union activity at Edy's Fort Wayne plant, and became a member of the Union's organizing committee. The Union's letter of December 27, 1993, to Edy, named Shlater as a member of its organizing committee.

In March, approximately 1 week after the representation election, Shipping Area Manager Jeff Black, an M-team member, suspended Shlater from the ORB. Black's stated reason for the suspension was Shlater's involvement with the Union's organizing committee. Shlater immediately asked Black if he would sign a document stating the reason for his suspension. Black complied.

Jeff Black, in a memorandum to Shlater's file, dated March 25, declared:

> At Steve [Shlater's] request I am writing this letter to his file about his removal from the O.R.B. Because of Steve's involvement on the union organizing committee he has been given a temporary suspension from the O.R.B. His business unit, M-Team and the rest of the business units are reviewing the structure of the committees and the roles of each committee. Once a final decision is made [sic] Steve, the plant and the other union organizers suspended from committees will be informed about the new structures of the plant committees and the teams [sic] participation in and on each committee.

Approximately 1 week after Black suspended him, Shlater's team reinstated him as their representative on the ORB. Shlater remained on the ORB until he quit his job at Edy's Fort Wayne plant in June.[10]

d. *Amy L. Wickensheimer*

Employee Amy L. Wickensheimer began working at Edy's Fort Wayne plant in 1989 as a palletizer. Wickensheimer became a member of the ORB in 1993, after she volunteered and received her team's approval.

Wickensheimer supported the Union's organizing effort at Edy's Fort Wayne plant. Her name was on the list of organizing committee members in the Union's letter of December 27, 1993, to Edy. She also voted in the representation election on March 17.

On or about March 24, M-team member Fred Andriano invited Wickensheimer to his office. Wickensheimer asked her team coordinator to accompany her to Andriano's office. When the two employees arrived at Andriano's office, he told Wickensheimer "As of this day, you are no longer the ORB representative for our team." When she sought an explanation, Andriano answered: "We need to re-evaluate who is representing us on our committees."

The following week, at a team meeting which Wickensheimer had called, she asked if the team had discussed her membership. In the discussion which followed, the team, with the support of M-team member John Williams authorized Wickensheimer to continue as the team's ORB representative.

At the next team meeting, at the end of April or in early May, Andriano announced that employee Eon Pence was the team's ORB representative. When a team member stated that Wickensheimer was their ORB representative, Andriano dissented. He asserted that Wickensheimer had been removed from the ORB. The team insisted that she was its ORB representative. Andriano argued that one who supports the Union cannot be a team player. However, after further discussion, Andriano and the team agreed that Wickensheimer would be the team representative on the ORB.[11]

e. *Joseph A. Troendly*

Joseph A. Troendly began his tenure at Edy's Fort Wayne plant on November 4, 1985, as a maintenance engineer. His responsibilities included trouble shooting, repairs, and preventive maintenance of all production equipment and supporting utilities such as refrigeration, boilers, H Vac and the C.I.P. systems. One other maintenance engineer began working at the Fort Wayne plant in October 1985 and a second began working there on the same day Troendly did. At the outset of his employment at Edy, Troendly was a member of a production team, to which he provided technical support. His starting hourly wage was "$9.50-something." In 1990 or

[9] My findings of fact regarding Palmer's employment, union activity, and removal from the ORB are based upon his credible testimony, which was uncontradicted.

[10] My findings of fact regarding Shlater's employment, union activity, and suspension from the ORB are based on his credible testimony, which was uncontradicted. I based my finding regarding Edy's knowledge of Shlater's union activity on the Union's letter of December 27, 1993.

[11] My findings of fact regarding Wickensheimer's voting in the representation election, her employment, and her suspension from the ORB, are based on her credible testimony, which was uncontradicted. My findings regarding her union activity and Edy's knowledge of it was based on a stipulation.

early 1991, the engineers also formed a functional team limited to their classification.

In October 1989, Troendy became chief engineer at the Fort Wayne plant. He insisted on receiving an hourly wage in his new position. Edy agreed and granted a $1 hourly wage increase to him. His immediate superior, Peter Hunter, who had been chief engineer, became technical operations manager and continued to be Troendly's immediate superior.

As chief engineer, Troendly continued to perform his normal maintenance engineer work. He had additional responsibilities. Troendly dealt with outside vendors and contractors. He checked packing lists and approved payment to vendors. He hired contractors to perform plant repairs which Edy's employees could not fit into their work schedule. He also received work orders, which he prioritized and assigned to engineering employees, exercising his independent judgment as to which employee was best able to perform the necessary work. In most instances, the employee who received such an assignment performed the work. Occasionally, the assigned employee did not have time to perform the work and passed it on to another employee.

Troendly prepared a proposed shift rotation schedule dated August 15, 1990, for all plant engineers, which he submitted to Hunter. I find from Hunter's testimony, that this proposed schedule was not adopted. Hunter also testified that he did not recall whether Troendly's final revision of this schedule went into effect.

During his tenure as chief engineer, Troendly drafted an engineer acclamation schedule. However, there was no showing that Edy adopted it or that Troendly assigned engineers pursuant to the draft.

Troendly, along with supercoordinators, Robert Byanski, and Steve Leatherman, issued a directive dated June 5, 1990, to all team members at Edy's Ft. Wayne plant, regarding downtime sheets. The directive announced that effective immediately, all team members would fill in their downtime sheets in accordance with the instructions listed in it. I find from the testimony of Edy's witness Peter Hunter that the teams were expected to follow these instructions and did so.

On another occasion, Chief Engineer Troendly and his superior, Technical Operations Manager Hunter, issued a directive to all engineering personnel regarding work data recordkeeping. Troendly prepared the directive, which incorporated his recommendations.

While he was chief engineer, Troendly was involved with various personnel actions. He and two engineers interviewed a prospective engineering employee and recommended him for hire. After another interview by a team committee which concurred in that recommendation, Edy hired him. The record does not show any other instance in which Troendly recommended hiring a prospective employee. A form entitled "New Employee Information" and dated March 27, 1990, contains personal information about engineering employee Clifford R. Ditto, and recites that Trondley is Ditto's immediate supervisor. I find from Troendly's uncontradicted testimony that his designation as Ditto's immediate supervisor was a mistake.

A notice which Edy issued in late November 1990, to announce the termination of employee Jerry Todd, bears Troendly's signature as Todd's supervisor. The record does not disclose whether Troendly discharged the employee, recommended such action or did more than sign the notice.

Troendly authorized employees to leave the plant for medical treatment. He also authorized the health care provider to treat employees who were injured on the job. However, I find from Troendly's and employee Wickensheimer's testimony, that any team member can authorize an injured employee to obtain medical treatment from Edy's health care provider.

Chief Engineer Troendly issued directives to all team members and to his engineering staff. In a memorandum dated June 19, 1990, Troendly instructed the "COP Team" to use four cords per fruit feeder rubber scraper to reduce wear. In another memo, dated July 24, 1990, concerning usage and loss of personal and company tools, Troendly instructed all team members to ask the owner's permission before borrowing any personal tool and to fill out a form before borrowing a tool from Edy. In August 1990, using his independent judgement, Troendly ordered all engineers to switch to a specified grease and increase grease intervals when the old grease was purged from the bearings. In the same month, Troendly issued a directive setting forth specific work that the engineers would perform on August 25, to change the pint line so that 6-ounce cups could be run on that line. Troendly exercised his own judgment in drafting this order which the engineers implemented.

A memorandum dated August 28, 1990, from Troendly to Kirk Raymond, Scott West, and Peter Hunter, contained staffing recommendations for the transfer of one named employee and the hiring of two new engineers. Troendly's memorandum does not identify the prospective employees. The record does not disclose whether the recommended transfer occurred .

In a memorandum to the M-team, dated October 17, 1990, Troendly recommended the transfer of engineer Todd to "the floor" and the hiring of Brad Ulrey and asked for the assignment of a new engineer for training during the first quarter of 1991. I find from Hunter's uncontradicted testimony, that Edy hired a new engineer in the first quarter of 1991, as a result of Troendly's recommendation. However, the record does not identify the new engineer.

In a memorandum dated November 8, 1990, Troendly promulgated guidlines for vacations to be taken in 1991. Although his memo stated that these guidlines were his suggestions and were open to discussion, the tone of the memorandum and its content strongly suggested that absent a change of mind on Troendly's part, these guidlines would govern the engineering staff's vacations during the coming year. Ultimately, the engineering staff complied with Troendly's memorandum in scheduling their 1991 vacations.

By memorandum to Pete Hunter, Plant Manager Kirk Raymond, and other supervisors during the week of October 29, 1990, Troendly announced that maintenance work was scheduled for Saturday, November 3, 1990. In the same memorandum, Troendly requested that no production requiring refrigeration be scheduled for Saturday.

On November 27, 1990, Troendly resigned as chief engineer, effective January 1, 1991. Troendly returned to his normal duties as a maintenance engineer and was assigned to team 41. However, he continued to receive the same hourly rate he had enjoyed as chief engineer. Troendly volunteered to take a $1 hourly reduction. Plant Manager Raymond permitted him to retain the extra $1 and said he would use

Troendly's expertise for training purposes.[12] When Troendly's resignation became effective, Edy required that he surrender the office to which it had assigned him when he became chief engineer.

I find from Peter Hunter's testimony, that plant engineers also recognized Troendly's expertise. Throughout his employment by Edy, engineers at the Fort Wayne plant relied on Troendly for guidance when confronted with problems involving their work.

In May 1992, while he was a maintenance engineer, Troendly, in a memorandum to Production Manager Scott "and staff," recommended employee Wanda Dabe for an "I-make-a-difference" jacket. On this recommendation, Edy awarded the jacket to Dabe. I find from Peter Hunter's and Steve Leatherman's testimony that supervisors and nonsupervisors can, and do, make similar recommendations to Edy's management for team members.

Later in 1992, M-team required each team to select one of its members to provide the rest of the team with instruction on Edy's 10 business principles, called "grooves." Troendly's team selected him as their grooves instructor. Troendly prepared a training course entitled "Grooves—A Team Point of View." He taught one groove twice per month. In 1993, the pride committee asked for, and received from Troendly, his grooves training course. The committee selected a groove-of-the-month, and posted the appropriate portion of Troendly's training course in the plant cafeteria. Troendly also used his training materials in the speech he delivered at a meeting of Fort Wayne plant employees. Plant Manager Raymond, and some of Edy's corporate executives were also present.

Troendly developed and set forth a proposal for engineering staffing which the "Engineering Group" submitted to management in March 1993. Troendly made presentations to the entire M-team regarding this proposal. The document containing the proposal begins by stating that the Fort Wayne engineers have been working an average of 6 days per week since the plant opened. Continuing, the proposal suggests that this situation contributes to low morale and is "detrimental to engineering output." The proposal offers goals designed to alleviate the problem, and then shows the current staffing, and one option, an 11-man staff, which the engineering group recommends to the M-team. In an addendum submitted with the proposal, the engineering group raises a second option, an 11-man staff and a 4-day production week.[13] The addendum concludes as follows:

> We hope this answers all concerns pertaining to this proposal. If any question arises, please ask Dave, Pete, Joe, or any of the Engineering group and we will strive to resolve your question.
>
> Respectfully,
> The Engineers

In August 1993, Troendly became aware of the Union's organizing campaign at Edy's Fort Wayne plant. He signed an authorization card for the Union, attended union meetings, and was a member of its organizing committee. The Union's letter of December 27, 1993, to Edy showed Troendly as a member of that committee.

Troendly actively assisted the Union's organizing campaign at the Fort Wayne plant in November 1993 and thereafter, in January or February. He wrote letters and distributed handbills, putting them in employee mailboxes located in the plant cafeteria. In January, Troendly put some union literature in Plant Manager Raymond's mailbox at the plant. Troendly posted union literature on a plant bulletin board, in a hallway leading to the production area.

In mid-January, after summoning Troendly to his office, Peter Hunter began talking about Troendly's involvement with the Union. Hunter continued: "We were surprised to see your name on the list. You are hightly respected. You are the highest paid. Why would you want a union?" Troendly replied that pay really was not an issue and that he wanted a contract. Continuing, Troendly said he was tired of seeing rules changed by the individual who was affected by it.[14]

Troendly participated in the representation election at Edy's Fort Wayne plant, which the Board conducted on March 17. He was a union observer and voted. However, his vote was challenged on the ground that he was a supervisor and thus ineligible to vote.

At the time of the representation election, Troendly had been a member of the ORB for approximately 7 years. On or about March 24, Hunter called Troendly to his office and announced that the M-team had decided to suspend Troendly from the ORB. Hunter said the reason for the suspension was Troendly's organizing activities. In his testimony before me, Hunter admitted that Fred Andriano had asked him to tell Troendly not to attend the ORB meeting.[15]

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[12] Hunter testified that when Troendly resigned as chief engineer, he, Hunter told him to retain the $1-an-hour wage increase as payment for continuing to perform as a supervisor. Hunter testified that nobody succeeded to the chief engineer position vacated by Troendly. Under further questioning. Hunter conceded that he picked up the duties and responsibilities of the chief engineer after Troendly resigned. Later, Hunter changed his story, testifying that all he did was relieve Troendly of the paperwork part of his duties. Hunter did not specify what that "paperwork" was. However, the record shows that following his resignation, Troendly ceased issuing directives to the plant engineers. Also Hunter testified in substance that Edy paid Troendly "the additional money" to provide guidance and expertise to other engineers. These inconsistencies and my impression that Troendly was the more forthright witness of the two, caused me to credit his testimony regarding his duties and status after he resigned as chief engineer, where it conflicted with, or was inconsistent with, Hunter's. I also credited Troendly testimony regarding his employment and union activity.

[13] Technical Operations Manager Peter Hunter, testifying in response to a leading question, without giving the matter much thought, agreed that the M-team followed the recommendations set forth in the engineering staffing proposal. As I have found, the proposal and its addendum show two options. However, Hunter did not specifiy which of the two options the M-team elected to follow. Nor did the record otherwise disclose the M-team's choice.

[14] I based my findings of facts regarding Hunter's interrogation of Troendly on their testimony.

[15] Before me, Hunter denied telling Troendly that his involvement with the Union was the reason for the request that Troendly not attend the ORB meeting. However, Hunter admitted that Fred Andriano instructed him to convey that instruction to Troendly. I have found above that when Andriano removed other activists from the ORB on or about March 24, he told them that their union activity was the reason for their removal request. Thus, it was likely that Andriano gave the same reason for Troendly's removal from the

2. Analysis and conclusions

An employer violates Section 8(a)(3) and (1) of the Act by taking adverse action against an employee for engaging in union activity. *EDP Medical Computer Systems*, 284 NLRB 1286, 1296, 1300 (1987). Here, I find that the removal of employees Alexander, Palmer, Shlater, Wickensheimer, and Troendly from the ORB was adverse action. In reaching this conclusion, I noted that each teams selects one of its members to sit on that committee. In contrast, membership on the other plant committees at Edy's Fort Wayne plant is voluntary. I also noted that the ORB is responsible for making recommendations to management regarding disciplinary action against team members. I find, therefore, that an employee's selection for membership on the ORB carried with it a substantial measure of responsibility. The removal of an employee from such a committee would diminish his or her responsibility in the plant and reduce his contact with fellow employees. Edy's removal of an employee from the ORB because of his or her union activity would be discriminatory conduct, tending to discourage union activity among its employees and therefore would violate Section 8(a)(3) and (1) of the Act. See *EDP Medical Computer Systems*, 284 NLRB 1232 (1987).

Under Board policy, the General Counsel has the burden to pursuade that Edy's antiunion sentiment was a substantial or motivating factor in its decisions to remove employees Michael Alexander, Ronald Palmer, Stephen Shlater, Amy L. Wickensheimer, and, assuming that he is an employee entitled to the Act's protection, Joseph A. Troendly from the ORB. The burden of pursuasion then shifts to Edy to prove, as an affirmative defense, that it would have removed them from the ORB even in the absence of union activity. *Manno Electric*, supra. If the record shows that the business reason or reasons which Edy has given to explain its decisions to remove the five employees from the ORB were pretextual—that is, that the reason or reasons do not exist or were not in fact relied on—it necessarily follows that Edy has not met its burden of pursuasion and the inquiry is logically at an end. *Wright Line*, 251 NLRB 1083, 1084 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Thanks to the Union's letter of December 27, 1993, Edy learned that Michael Alexander, Ronald Palmer, Stephen Shlater, Amy L. Wickensheimer, and Joseph A. Troendly were members of the Union's organizing committee. In addition to being on the organizing committee, Troendly, in November 1993, and thereafter, in January or February, further assisted the Union by writing letters and distributing them and handbills to employees at Edy's Fort Wayne plant. Troendly signed a union card, attended union meetings, and was a union observer at the Board-held election on March 17.

In mid-January, Edy responded to the Union's letter. Troendly's supervisor, Peter Hunter, after summoning him to his office, questioned Troendly about his union sentiment. Hunter began by remarking, in substance, that Edy's management was surprised to see Troendly's name on the Union's list in the letter of December 27, 1993. He went on to ask why Troendly wanted a union. Troendly answered that he wanted a contract, and that he was tired of seeing individuals changing rules that affected them.

The General Counsel alleges that Hunter's interrogation of Troendly violated Section 8(a)(1) of the Act. Edy denies that allegation and contends that Troendly has been a supervisor since November 27, 1990, when he resigned as chief engineer. Assuming that Troendly was an employee entitled to the protection of the Act, I find merit in the General Counsel's contention.

I have assessed the totality of the context in which Hunter interrogated him, and find that they would have tended to restrain, coerce, and interfere with Troendly's exercise of his right under Section 7 of the Act to support the Union. Thus, have I applied the Board's test as prescribed in *Rossmore House*, 269 NLRB 1176, 1177–1178 fn. 20 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006, 1007–1009 (9th Cir. 1985). In reaching my finding in this regard, I noted that Hunter, was Troendly's supervisor; that Hunter summoned him to his office during working hours specifically to tell him that Edy's management was shocked to learn of Troendly's alliance with the Union, and to find out why he wanted a union. I also noted that there was no showing that Hunter assured Troendly that Edy would refrain from reprisals against him because he supported the Union. Nor did Hunter explain to Troendly why he, Hunter, was asking why Troendly wanted a union. Indeed, as found below, within 2 weeks after the Board-held election, which occurred on March 17, Edy resorted to unlawful reprisals against Troendly and other employees identified as union supporters. In sum, assuming that Troendly was entitled to the Act's protection I find that Hunter's questioning of him ran afoul of Section 8(a)(1) of the Act.

Edy contends that even after he resigned as chief engineer, effective January 1, 1991, Troendly was not protected by the Act on the ground that he continued to be a supervisor within the meaning of Section 2(11) of the Act. Section 2(3) of the Act excludes from the definition of the term "employee" "any person employed as a supervisor." The General Counsel urges rejection of Edy's contention. I find that Edy's contention is fatally short of evidentiary support.

As the party seeking to establish that Troendly was a supervisor within the meaning of Act, Edy has the burden of proving that at the time of his interrogation he posseessed and exercise at least one of the authorities set forth in Section 2(11) of the Act. *Northwest Florida Legal Services*, 320 NLRB 92 fn. 1 (1995). That section of the Act defines a "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

ORB. Further, in his pretrial affidavit, Hunter admitted that he was informed that union activity was involved in the decision to remove Troendly from the ORB. In any event, Hunter seemed to be reluctant to give a full account of this encounter with Troendly. In contrast, Troendly testified about this incident in a full and forthright manner. For these reasons, I have credited Troendly's account.

The first portion of Section 2(11) is read in the disjunctive. The possession of any of the powers enumerated there, however, confers supervisory status only if its exercise "involve[s] the use of true independent judgment in the employer's interest" *Beverly Enterprises v. NLRB*, 661 F.2d 1095, 1098 (6th Cir. 1981).

Assuming that Troendly was a supervisor within the meaning of the Act prior to January 1, 1991, there is no showing that he retained that status after that date. After Troendly had resigned as chief engineer, Edy did not tell him that he continued to be vested with supervisory authority. Instead, Plant Manager Raymond explained that he expected Troendly to provide expertise for training purposes in return for the extra $1 per hour which he had received as chief engineer. Further Hunter conceded that Edy continued to pay the extra $1 per hour to Troendly after January 1, 1991, to provide guidance and expertise to other engineers. Further, the record does not show that Troendly exercised any of the elements of supervisory authority prescribed in Section 2(11) of the Act.

Troendly's successful recommendation of Wanda Dabe for an "I-make-a-difference" jacket does not support Edy's contention that he was a supervisor after January 1, 1991. Under the terms of Section 2(11) of the Act, Edy must show that Troendly effectively recommended that Dabe be given that reward. Thus, Edy must show that it accepted Troendly's recommendation without further investigation of Dabe's entitlement to the jacket. Edy has not satisfied this requirement. Instead, the record shows only that successful recommendations originate from members of management and from employees. Absent is any showing that Edy differentiates in its treatment of these recommendations.

Troendly's leadership in the preparation and presentation of a proposal for engineering staffing on behalf of the engineering group did not entail the exercise of supervisory authority. There was no showing that Troendly used independent judgment to assign or direct anyone to do anything. Instead, he tendered advice to management for use as a tool to improve output and morale. Thus, contrary to Edy's position, Troendly's leading role in the preparation and presentation of this proposal did not constitute the exercise of statutory supervisory authority. *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996).

Also without merit is Edy's further suggestion that Troendly exercised supervisory authority in his preparation and use of training materials to teach employees about its "grooves" Here again, Edy has failed to show that Troendly used independent judgment to assign work, direct employees in their work, or otherwise exercise any of the authority listed in Section 2(11) of the Act. The Board has recognized that instructing employee concerning an employer's policies regarding employee conduct "demonstrates neither authority over the employees nor the exercise of independent judgment as required by Section 2(11)." *S.D.I. Operating Partners*, supra at 112.

Finally, Edy argues that Troendly exercised supervisory authority after January 1, 1991, by providing work direction to other maintenance teams members (Edy's Br. 20). However, the record shows only that Troendly has provided instruction and guidance to other maintenance team employees based on his experience and skill. There was no showing that these responsibilities involved any real managerial discretion which would require Troendly to exericse independent judgment. *S.D.I. Operating Partners*, supra at 111.

As Edy has failed to show that Troendly was a supervisor within the meaning of Section 2(11) of the Act, I find that at all times material to these cases, he was an employee within the meaning of Section 2(3) of the Act. Accordingly, I find that Hunter violated Section 8(a)(1) of the Act by coercively interrogating Troendly. I also find that Hunter's resort to unlawful interrogation contributed to the General Counsel's showing that union activity was a factor in Edy's decision to remove Troendly, Alexander, Palmer, Shlater, and Wickensheimer from the ORB.

Four days after the election, Edy's antiunion sentiment surfaced in Plant Manager Raymond's letter to his employees. Thus, after applauding the Union's defeat, Raymond 's letter goes on to refer to the preelection campaign as an experience which was "extremely bad" for the Fort Wayne plant "and one which we should not repeat!" At the hearing before me, Raymond again showed his hostility toward union activity at his plant, when likened union activity to stealing from the company or punching somebody out, offenses for which, under Edy's policy, one could be discharged without warning.

Members of Edy's management also articulated antiunion sentiment in connection with the removal of the five employees from the ORB. When he announced Troendly's removal from the ORB on or about March 24, Hunter said that union activity was the reason for the removal. Shipping Area Manager Jeff Black's memorandum dated March 25, clearly showed that Edy's management had participated in the decision to remove Shlater from the ORB and that his union activity motivated management. In early April, M-team member Fred Andriano remarked that employee Palmer's membership on the ORB presented a "trust problem." Andriano's remarks came in the wake of discussion referring to Palmer's union activity. Later, in late April or early May, Andriano told a team meeting that anyone who supported the Union could not be a team member.

Two other factors add to the General Counsel's proof of unlawful motive here. The first is the timing of the five removals. All except Palmer's occurred on or about March 24, 1 week after the Union 's loss of the representation election and 3 days after Plant Manager Raymond's antiunion memo to "ALL TEAM MEMBERS." Palmer's removal came in early April, just 3 weeks after the election. The second factor was the selection of these five for removal. At the time of their selection, Edy knew they were union supporters. Also, they were the only employees selected for removal from the ORB.

In sum, the General Counsel has made a strong showing that support for the Union motivated Edy's effort to remove Alexander, Shlater, Wickensheimer, Palmer, and Troendly from the ORB. The evidence shows Edy's knowledge of their union activity, Edy's antiunion sentiment, the timing of their selection after the plant manager's memorandum in which he expressed the hope that there would not be a repetition of the Union's campaign and the fact that these five employees were the only ones chosen for removal.

At the hearing before me, Edy's counsel suggested that the employee members of the ORB were responsible for the removal of the five union supporters from that committee. The record shows that M-team members were on the ORB at all

times material to these cases. More importantly, the record makes plain that Edy's M-team played an active role in at least four of the five removals. In the fifth removal, involving Palmer, M-team member Andriano endorsed and explained it as a "trust problem," which I find to be a euphemism for union activity. Jeff Black's memo shows beyond question that the writer, an M-team member, suspended Shlater from the ORB, independent of the members of that committee. The same memo shows that Shlater's support for the Union motivated Black in this regard. I also find that Andriano's "trust problem" remark and Black's memo to Shlater restrained and coerced these employees in violated of Section 8(a)(1) of the Act.

Accountant Andriano, an M-team member, played a major role in three instances of removal from the ORB. It was Andriano, who notified Alexander and Wickensheimer of their removal. When he suspended her, Andriano told Wickensheimer, "We need to reevaluate who is representing us on our committees." Thus, did Andriano include management in the removal process. Further, Andriano expressed opposition to her reinstatement to the ORB on the ground that a union supporter "cannot be a team player." M-team member Peter Hunter, on Andriano's advice, told Troendly not to attend the ORB meeting because of union activity. I also find that by these remarks Andriano and Hunter impaired the listening employees' Section 7 right to support a union and thereby violated Section 8(a)(1) of the Act.

From the foregoing, I find that Edy's management participated sufficiently in the removal of the five employees from the ORB to warrant a finding that Edy was responsible for that action. I also find ample evidence showing that Edy's management was hostile toward employees who supported the Union. Thus, there is strong evidence that union animus motivated Andriano and his M-team colleagues, when they removed the five union supporters from the ORB.

However, Supervisor Black's memorandum erased any doubt of Edy's antiunion purpose. According to Alexander's testimony a team member told him that Edy was suspending him from the ORB because of management's intent to streamline committees due to the increase of overtime and difficulty in covering work assignments. Black's memorandum did not provide such an explanation. Instead, Black wrote that the business units and M-team were reviewing the structure of the committees and the roles of each committee. Andriano's explanation was that: "We need to reevaluate who is representing us on our committees." None of these explanations disclose why Edy focused upon only union supporters in its effort to alter the ORB. But Black's explanation discloses that that the only reason why Edy removed employees from the ORB was that they were "union organizers."

In short, Edy has left unchallenged the General Counsel's strong showing of unlawful motive. Accordingly, I find that by removing or suspending the five employees named above from the ORB, Edy violated Section 8(a)(3) and (1) of the Act.

D. *Lois Jones' Discharge*

1. The facts

Edy hired Lois Jones in November 1984, as one of the orginal employees at its Fort Wayne plant. Jones was a production team member throughout her employment at Edy. Prior to her discharge in April, Edy did not discipline her. Early in the year of her discharge, team members selected Lois to be a member of Edy's all-star team because of her outstanding performance in shipping administration.

The record shows, and Edy concedes in its posthearing brief that Jones assisted the Union's campaign in late 1993 and early 1994. She signed a union card, joined its organizing committee, passed out union cards to fellow employees at the plant, and twice stuffed union literature in employees' mailboxes, at the plant. The Union included Jones' name in the list of organizing committee members in its letter to Edy in December 1993.

In January, Jones' physician recommended surgery and provided her with his certificate stating as follows:

> Lois is scheduled to have a L mitchell bunionectomy with Dr. P. Reszel Feb. 22, 1994. *She will be off work at least 6–8 weeks following surgery.* [Emphasis added.]

Jones offered this certificate to M-team member John Williams, an admitted supervisor, who told her to give it to Personnel Benefits Administrator Elaine Krider. Jones gave the certificate to Krider. Neither Williams nor Krider gave any additional information or instructions to Jones.

According to the disability leave of absence section of Edy's employee handbook:

> The disability leave of absence will be for the period of disability up to a maximum of twelve months and will be administered according to applicable federal and state laws.
>
> All requests for a disability leave of absence must be made in writing for final approval. The request must include a doctor's certificate stating the nature of the disabling condition and the *estimated period* of disability. You will be given additional detail information at that time. [Emphasis added.]

In March, Jones appeared on crutches at the Board's representation election at Edy's plant and voted. She departed without any contact with management.

On March 30, Jones attended a team meeting at the plant. M-team member Williams was present. At this meeting, Jones discussed changes in team assignments and her new assignment in the dry warehouse. Williams asked Jones how she was doing, and when she expected to return to work. Jone replied that she did not know when she would return because she had a pin in her foot.[16]

[16] Jones testified that she does not remember having any conversation with team leader Peter Kuras, in which she said that she expected or was expected to return to work on April 18. However, Kuras testified on direct examination that he advised Jones as follows:

> A: Well, Lois, we are expecting you back the 18th [of April]. We really got to have you back. I mean, if you can kind of push it, it would be helpful if you could make it back in here but just remember, your note is to the 18th and if you are going to be any later than that, we are going to need to know, so why don't you let us know when you go back to the doctor on the 11th let us know what the status of that is.

Continued

Eight days later, Jones visited her doctor to have him remove the pin from her foot. Jones did not return to work on April 19 or thereafter. By letter dated April 22, Plant Manager Kirk Raymond notified Jones that because she had been absent for 3 consecutive days, Edy was "removing [her] from the active payroll and treating [her] conduct as a voluntary resignation effective Saturday, April 23, 1994."

On April 25, Jones visited her doctor, who issued an updated certificate authorizing her return to work on May 15. That same day, when she arrived home, Jones found Raymond's letter announcing her "voluntary resignation."

Jones immediately went to Edy's Fort Wayne plant and asked to speak to Plant Manager Raymond. Arriving in his office, she encountered John Williams. Jones asked him if there was any way "to straighten out this." Williams answered no, asked her to return her plant key and directed her to clean out her locker. When Jones asked if union activity had anything to do with what was happening, William said no. He also refused to look at her latest doctor's note. Edy has not offered to reinstate Jones.

2. Analysis and conclusions

The General Counsel urges me to find that Edy discharged Lois Jones in reprisal for her active role in the Union's campaign. Edy argues that union activity had nothing to do with the termination of Jones' employment. Instead, according to Edy, the record shows that Jones terminated herself by failing to report for work for 3 consecutive days without notifying the Fort Wayne plant. Applying the Board's policies spelled out in *Manno Electric*, 321 NLRB at 280 fn. 12 and in *Wright Line*, supra, I find that the General Counsel has sustained his evidentiary burden.

Prior to March 17, the date of the representation election at its Fort Wayne plant, Edy was well aware of Lois Jones' union activity. Indeed, in its brief (p. 30), Edy admits that it became aware of her membership on the organizing committee from the Union's letter of December 27, 1993.

Raymond's memo describing the Union's recently concluded organizing campaign as an experience which was "extremely bad for us and one which we should not repeat" reflected Edy's antiunion sentiment. His testimony before me also showed his willingness to discharge supervisors or anyone for engaging in union activity. Edy's willingness to resort to unlawful conduct to punish union supporters was exemplified by its removal of five employees from ORB membership because of their union activity.

A further ingredient in the General Counsel's case is the timing of Raymond's letter announcing Jones' voluntary resignation. It came only 1 month after Raymond's postelection antiunion memo. Raymond's letter to Jones also came less than 4 weeks after the removal of five employees from the ORB in violation of Section 8(a)(3) and (1) of the Act.

Reflecting upon the evidence I have recited above, I find that the General Counsel has made a strong showing that Lois Jones' union activity motivated Raymond to terminate her employment by his letter of April 22. Edy's effort to rebut that evidence falls short of the mark.

According to Edy, Jones voluntarily quit her employment. Edy asserts that Jones failed to appear for work on April 18, when she was scheduled to return from disability leave, and did not either return to work or contact the plant for 3 consecutive days thereafter. Pointing to an unwritten policy it has maintained at the Fort Wayne plant, Edy insists that it was free to infer from this conduct that Jones had voluntarily quit. I find that the record does not support Edy's position.

In support of this explanation, Edy provided the testimony of Kirk Raymond, the author of the termination letter of April 22. His testimony did not assist Edy's cause. Raymond insisted, contrary to Jones' medical certificate, that: "The doctor said she was available to return to work on the date she should have been to work and she wasn't." Raymond also testified, contrary to fact, that: "We had a doctor's slip stating that she would return to work on a certain day." As shown above, Jones' doctor's certificate declared that her surgery would take place on February 22 and that "[s]he will be off at least 6–8 weeks following surgery." Thus, the doctor's note belied Raymond's testimony.

Other factors cast doubt upon Edy's explanation of Jones' discharge. Thus, I find from the testimony of Edy's witness, Elaine Krider, who has worked at the Fort Wayne plant for the past 10 years, that no other employee of that facility has been terminated for failing to return to work from medical leave on a specified date. I also note that between April 18 and April 22, Edy made no effort to contact Jones, who had been in its employ for 8 years, without any blemish on her record, and whose team had recently elected her to Edy's all-star team for her job performance. In sum, I find that Edy's proffered defense of its decision to terminate Jones is pretextual.

Having considered the strong evidence of unlawful motive and Edy's failure to rebut it, I find that the General Counsel has sustained his burden of showing by a preponderance of the evidence that Edy terminated Jones because she had supported the Union's organizing campaign at the Fort Wayne plant. I further find that by terminating Jones, Edy violated Section 8(a)(3) and (1) of the Act.

E. *The Discharges of Steve Leatherman, Robert Byanski, and Joe Troendly*

1. The facts

Edy hired Steve Leatherman in February 1986. Initially, Edy employed Steve as a convocan operator, engaged in making packaging. After a few days he became a fruit feeder. Steve belonged to a production team, and was hourly paid, with a weekly guarantee of 40 hours. During his tenure at Edy's Fort Wayne plant, Steve received a verbal warning for arguing with a facilitator about hours of work. In 1991 or 1992, Edy recognized his contribution to its productivity by designating him as a member of its all-star team and awarding a plaque to him.

On January 1, 1990, in a plantwide election, the Fort Wayne employees elected Steve to be one of two supercoordinators. He also received an hourly wage increase of $1.50. Steve served as a supercoordinator until 1991, when Edy abolished that position. Steve returned to production as

However, when I asked Kuras if he had warned Jones that if she intended to remain on sick leave beyond April 18, she needed a further note from her doctor, he testified that he could not answer yes or no. This response was inconsistent with the quoted testimony and substantially impaired its credibility. Moreover, no M-team members testified that they ever told Jones that she was expected back on April 18, or needed a note to extend the date.

a convocan operator on a team, but continued to receive the additional $1.50 per hour in his wages. A few months later, Steve became a freezer filler. In this classification, he ran a freezer and a packing machine which packages the ice cream. He was a member of team 31.

Steve became involved in the Union's campaign at Edy's Fort Wayne plant. He attended a few union meetings. His name appeared on the Union's letter of December 27, 1993, to Edy, as a member of the Union's plant organizing committee. Prior to the the Board's representation election among its Fort Wayne employees, Edy held meetings with its employees to discuss the Union. Before the first meeting, Supervisor Jeff Black advised Steve, in substance, that management was aware of his prounion stance and that he should not go to the meeting. Thereafter, prior to similar meetings other members of management told Steve not to attend them. During the Union's campaign, at the plant, Steve wore a small "Vote Yes" button on his jacket.

During the Board-held election on March 17, Steve attempted to vote. However, Edy challenged his ballot on the ground that he was a supervisor.

On March 31, Steve was summoned from his freezer filler operation to Plant Manager Raymond's office. After he arrived at the office, Raymond, in the presence of Production Manager West, discharged Steve Leatherman. In his testimony before me Raymond, in substance, admitted discharging Steve for engaging in union activity, while enjoying the status of a supervisor.[17]

Robert Byanski's employment at Edy's Fort Wayne plant began in the summer of 1987. He began working full time as a temporary employee. Six months later, Edy hired him as a regular full-time employee. He initially worked as a palletizer in the freezer. By the time Byanski achieved regular full-time status, he was a cleanup employee. He cleaned and sanitized production parts and belonged to a team. In the course of his employment at Edy, Byanski moved from one production classification to another. In 1992, he received recognition as an all-star in production.

Along with Leatherman, Byanski was elected supercoordinator and began functioning in that position on January 1, 1990. Byanski also began receiving an additional $1.50 in his hourly wage. Upon the elimination of the supercoordinator classification in 1991, Byanski returned to production duties and became a member of team 51. He continued to receive the additional $1.50 per hour in his wages. Byanski remained a production employee until his discharge in 1994.

Late in 1993, Byanski became aware of the union campaign at Edy's Fort Wayne plant. He signed an authorization card for the Union and was a member of its organizing committee. Byanski's name appeared on the list of organizing committee members in the Union's letter to Edy, dated December 27, 1993. At the hearing before me, Edy's counsel, by stipulation, conceded that Edy was aware of Byanski's union activity from that letter.

In early 1994, prior to the representation election among the Fort Wayne employees, Plant Manager Raymond and Byanski discussed the Union in Raymond's office. Byanski remarked that unless Edy adopted seniority and "some kind of fair pay raise scale," he was likely to vote for the Union. Raymond replied, in substance, that a union would not work in a team system. He also suggested that if Byanski were unhappy working at Edy, he should see if he could obtain more money "out in the open market."

Byanski attended only one of Edy's preelection meetings at which the Union was discussed. When Byanski discovered that he had not been invited to a subsequent meeting, he asked two supervisors for an explanation. One of the two explained that Edy felt that he favored the Union and that there was no use in inviting him to Edy's preelection meetings.

On March 17, Byanski attempted to vote in the representation election. Edy challenged his ballot on the ground that he was a supervisor and, therefore, ineligible to vote.

On March 31, while he was on sick leave, Production Manager Scott West suspended Byanski until the following Monday, April 4. West instructed Byanski to report to Plant Manager Raymond on Monday afternoon. When Byanski reported to Raymond's office as instructed, the plant manager discharged him for engaging in union activity.

As found above at page 10, in 1985 Edy hired Joseph A. Troendly as a maintenance engineer. Approximately 4 years, later. Edy promoted Troendly to chief engineer and added $1 to his hourly wage rate. On November 27, 1990, Troendly resigned as chief engineer effective January 1, 1991, and returned to his duties as maintenance engineer. He continued to receive the $1 hourly wage increase which Edy had granted to him as chief engineer.

As detailed above, at page 14, Troendly actively supported the Union. Edy knew of his membership on the Union's plant organizing committee from the Union's letter. Indeed, as found at page 14, in mid-January, his supervisor, Peter Hunter, revealed that knowledge when he questioned Troendly about his union sentiment.

I have found at page 14, above, that Troendly was a union observer at the Board-held election on March 17 and that he attempted to vote. However, Edy challenged his vote, contending that he was a supervisor.

Soon after the election, Troendly's situation at Edy's Fort Wayne deteriorated. On or about March 24, Edy suspended Troendly's membership on the ORB. Two weeks after the election, Edy discharged him because he was a supervisor while engaged in union activity, thereby compromising his loyalty to his employer. However, as found above, at page 17, after January 1, 1991, Troendly was not a supervisor within the meaning of Section 2(11) of the Act, but was an employee entitled to the protection of the Act.

Edy and the General Counsel have raised the same issue as to Leatherman and Byanski. Edy contends that both were supervisors within the meaning of Section 2(11) of the Act. In the ensuing recitation I present my findings of fact regarding their status while they were supercoordinators and after Edy abolished those positions in 1991.[18]

In a memorandum to "All Team Members," dated October 10, 1989, the M-team announced the appointments of Robert Byanski and Steve Leatherman as "the new shift coordinators." Byanski was to "be on nights." Leatherman

[17] My findings of fact regarding Steve Leatherman's employment by Edy, up to the point of discharge, and his union activity are based on his undisputed testimony.

[18] Steve testified that Edy abolished the supercoordinator positions in 1991 or 1992. Byanski did not testify about the topic. As Plant Manager Raymond testified with certainty that the position was abolished in 1991, I have credited him in this regard.

would "be on nights." The memorandum sketched the shift coordinators' responsibilities, as follows:

> These guys will insure that the schedule goes more smoothly. They will also help with training, decision making, coordination between teams, and making sure that everyone knows what is going on. They will be attending team meetings and letting you know how we're performing against our goals. Look at Bob and Steve as a source of information and for help in day to day decisions.

The memorandum concluded:

> Having shift coordinators is a big step toward getting things back to "normal" here. Please give them your full support, as we will. We look forward to a much nicer environment here real soon.

Edy granted hourly wage increases of $1.50 to each of the supercoordinators. However, Bob and Steve continued to wear the white slacks and white shirt which was the work uniform of the production employees. Members of Edy's Fort Wayne M-team and the plant manager wore a shirt or a sweater, issued by Edy, which distinguished them from the supercoordinators and the rank-and-file employees. The supercoordinators received the same fringe benefits as the other hourly paid plant employees. The plant manager and the other agreed supervisors were salaried and received stock options as part of their compensation from Edy. They also received the same life insurance and vacation benefits as the rank-and-file employees did. Neither the supercoordinators nor the plant employees received stock options.[19]

Bob and Steve enjoyed the same authority. Both participated as members of an interview committee in the hiring of new employees. They, along with other committee members, interviewed job applicants. I find from their testimony that both made recommendations to hire, and that Edy sometimes acted in accordance with them. However, I find from Amy L. Wickensheimer's testimony that Bob and Steve lacked authority to hire employees on their own. I find from Bob's testimony that they had, and exercised, authority to rotate their own shifts.

The supercoordinators, as members of their respective team committees, recommended the disciplining of employees to the ORB. The M-team had the final word on discipline. Steve did not know how many of his recommendations were either followed or not followed. Bob's testimony is silent as to the effectiveness of his recommendations of discipline, while he was a supercoordinator. When another team's committee was considering the imposition of discipline on a team member, the supercoordinators sat in on the meeting, but did not participate in the recommendation. Nor did they make their own recommendations in such cases. I find from Amy L. Wickensheimer's uncontradicted testimony that supercoordinators did not have authority to discipline employees.

Bob and Steve, along with Chief Engineer Troendly, issued a directive in June 1990 to all team members at Edy's Fort Wayne plant regarding downtime sheets. As found above, at page 11, the directive announced that, effective immediately, all team members would fill in their downtime sheets in accordance with the norms listed in it. I have also found that the teams were expected to follow these instructions and did so.

The supercoordinators had authority to decide how many temporary employees would be required to meet production goals on a daily basis, and request the temporary agency serving Edy to send the necessary temporary employees to the Fort Wayne plant. Bob and Steve used independent judgment when they assigned work to the temporary employees. Bob and Steve also directed team members to train the temporary employees in particular tasks, as needed. The supercoordinators had authority to transfer temporary employees from one task to another and to evaluate their performance. If Bob or Steve found a temporary employee's performance to be unsatisfactory, they each had authority to obtain a replacement from the agency.

The record shows that the supercoordinators signed as supervisors on various personnel forms regarding occupational injury reports, medical treatment authorizations, terminations, new employee information reports, and wage increases. However, there was no showing that they recommended the wage increases, or terminations reported in these documents. Further, I have found above, at page 12, that any team member can authorize an employee to receive medical treatment from Edy's health care provider. I find from Wickensheimer's uncontradicted testimony that the supercoordinators did not have authority to grant time off, on their own, to team members.

Edy abolished the supercoordinator positions at the Fort Wayne plant in 1991. Yet, Bob and Steve continued to receive the $1.50 hourly wage increase which had accompanied their appointment to that classification in 1989. However, there was no showing that after they returned to production work they continued to sign personnel actions, or issue directives to employees, as supervisors. Nor did the record show that Bob or Steve had any further opportunity to call in temporary employees or otherwise concern themselves with such employees' training, work assignments, or performance after the abolition of the supercoordinator positions. Nor did the record show that after they returned to production work, any member of Edy's management ever told Bob or Steve that Edy expected them to perform any of the duties and bear any of the responsibilities of a supercoordinator.

Plant Manager Raymond's testimony regarding Bob's and Steve's status after the termination of their supercoordinator positions is burdened with infirmities. On the first day of the hearing, Raymond testified that after they returned to production, Bob and Steve contined to have authority to hire and fire employees, impose layoffs, and make work assignments. He also testified that they continued to exercise such authority. When asked if he had records to show that they had exercised this authority, Raymond answered that he would "have to look at the records." However, he presented no records. Later, in his testimony, on the same day, when asked if they could continue to hire and fire, Raymond changed his position. He asserted that they could recommend such actions, "[a]bsolutely." When asked if he followed such recommendations, he became evasive. Raymond answered: "We very well could, yes." When I asked him

[19] My findings regarding attire, compensation, and fringe benefits are based on Plant Manager Raymond's uncontradicted testimony.

about the effectiveness of those recommendations, he avoided the question by answering: "We had a lot of trust in them."

When asked if Bob and Steve turned their evaluations of employees in to a member of the M-team, Raymond avoided a direct yes or no and answered: "They could have been asked to do so." When asked if they evaluated employees, he answered: "Absolutely." However, when asked if there were any records to reflect this action, Raymond answered: "We would have to go through team meetings and meeting notes and whatever. Could be." Raymond did not produce any records during the hearing which extended from January 29 until February 1, 1996.

On the second day of the hearing, Raymond contradicted himself. Initially, he testified that after Edy abolished the supercoordinator positions Bob and Steve continued to have the authority to hire, fire, discipline, and direct the work of others, independently. However, after further examination, Raymond admitted that they could not accomplish any of the enumerated personnel actions on their own.

My impression that Raymond was withholding answers which he believed would be helpful to the General Counsel added to the incidents of evasion and inconsistency in his testimony cast serious doubt on the reliability of his testimony regarding Bob's and Steve's status after Edy terminated their positions as supercoordinators. Edy's failure to support Raymond's testimony with the records he spoke of, added to my assessment that he was an unreliable witness. For these reasons, I have rejected his testimony that Robert Byanski and Steve Leatherman had supervisory authority after they returned to production work in 1991 or 1992.

2. Analysis and conclusions

Edy argues that it lawfully discharged Bob and Steve for engaging in union activity in 1994 on the ground that they continued to be statutory supervisors after their supercoordinator positions were abolished in 1991. For, if they were supervisors, within the meaning of Section 2(11) of the Act, after they ceased being supercoordinators, Bob and Steve were not entitled to the Act's protection. However, I find that Edy has not sustained its burden of showing that after 1991 and, until their respective discharges, they possessed and exercised at least one of the authorities delineated in Section 2(11) of the Act. *Northwest Florida Legal Services*, 320 NLRB 92 fn. 1, supra.

The Board has rejected contentions that individuals are supervisors, where there was no showing that the disputed individual exercised supervisory power and that the employer told the alleged supervisor that he or she had the necessary authority. *Warrenton Rubber*, 289 NLRB 3, 17 (1988); *Faulkner Hospital*, 259 NLRB 364, 370 (1981). In the instant case, assuming that they were statutory supervisors while they were supercoordinators, there was no showing that Edy told Robert Byanski or Steve Leatherman that they continued to enjoy supervisory authority, notwithstanding they were no longer supercoordinators. Instead, Edy attempted to show that the two should have known from its policy that they continued to be supervisors even without the titles.

Edy's argument rests on its policy which requires employees to utilize skills acquired in its employ and for which they continue to receive additional wages, in whatever classification they may be working, as long as they are in Edy's employ. Thus, Edy claims that Byanski and Leatherman retained the additional $1.50-an-hour wage increase after they returned to production because it expected them to continue to act as supervisors. However, unlike the other instances in which employees continue to use skills acquired working in other existing classifications, Edy has abolished the supercoordinator classification and replaced it with a facilitator classification. Further, Edy's has not shown that it has extended that policy to M-team members or other alleged supervisors. Indeed, as found above, Edy did not expect Joseph Troendly to assume supervisory responsibilities after he had relinquished his position as chief engineer. In these circumstances, I find that Edy has failed to show that it extended its policy regarding application of acquired skills beyond the needs of its production to its former supercoordinators.

Nor was there any showing that Byanski or Leatherman had anything to do with the hiring, training, assignment, or retention of temporary employees or that they issued any directives or written personnel actions after they ceased acting as supercoordinators. Indeed, aside from Plant Manager Raymond's bare assertions that Byanski and Leatherman had enumerated supervisory authority after they returned to production in 1991, there was no documentary evidence or testimony by other witnesses showing that they had and exercised that authority after 1991. I find, therefore, that Edy has failed to sustain its burden of showing that Byanski and Leatherman continued to be supervisors after 1991. *Control Services*, 314 NLRB 421 (1994). Accordingly, I find that after 1991, Byanski and Leatherman were not supervisors within the meaning of Section 2(11) of the Act. Instead, I find that they were employees entitled to the Act's protection.

Having found that Byanski, Leatherman, and Troendly were employees entitled to the Act's protection when they engaged in union activity and thereafter, I find that Edy unlawfully discriminated against them. Thus, I find, from the foregoing, that Edy violated Section 8(a)(3) and (1) of the Act by suspending Byanski, and then discharging him for engaging in union activity. I also find that Edy violated Section 8(a)(3) and (1) of the Act by discharging Leatherman and Troendly for union activity.

I also find that Edy impaired Byanski's statutory right to engage in union activity, early in 1994, when Plant Manager Kirk A. Raymond suggested that if he was unhappy working at Edy, he should see if he could obtain more money "out in the open market." This suggestion came in the course of a discussion, in Raymond's office, about the Union, in which Byanski expressed prounion sentiment. In this context, Raymond's suggestion implied that if Byanski did not leave his job, Edy would get rid of him because of his support for the Union. I find that by this implied threat, Edy violated Section 8(a)(1) of the Act. *HarperCollins Publishers*, 317 NLRB 168, 180 (1995), enfd. in relevant part 79 F.3d 1324 (2d Cir. 1996).

F. *The Suspension and Discharge of Amy Wickensheimer*

1. The facts

On May 6, Amy Wickensheimer and all team members at Edy's Fort Wayne plant signed a written statement entitled "Acknowledgement of Committment to the Grooves and Plant Philosophies." By signing this statement, Wickensheimer agreed to "attend all team meetings required of [her] as a Team member." However, Amy missed some team meetings after May 6. On August 30, Amy attended her team's meeting and received instructions to attend all team meetings. M-team member John Williams instructed her that if she intended to miss a team meeting, she must obtain prior approval from an M-team member. Amy's team also told her that if she wanted to take a day off, she must give prior notice to the team.

On October 4, Amy was absent from work. That same day, Amy called her functional team, and, after talking to employee Brad Ulrey, was satisfied that someone would cover for her without interfering with the functional team's production. On the same day, Amy missed her business team's meeting.

Amy did not return to work on the following day. On that day, she telephoned her facilitator, Peter Kuras, who asked if she was sick. She answered no and that it was an incident, an unexcused absence. Amy told Kuras that she intended to take the rest of the week off. Kuras advised Amy that she was could not take the week off without clearance from the plant manager. He also reminded her that if she intended to take the week off as personal days, she needed clearance from her team at least 1 week in advance. Kuras finally advised her to call in sick or call in her absence each night.[20]

Amy's business team took action against Amy. On Wednesday evening, October 5, Amy's business team coordinator, Terry Herrell, telephoned Amy and told her that the team had suspended her.[21] One week later, Amy's business team had a meeting in which the agenda was "Amy Wickensheimer." Amy was present at this meeting and had an opportunity to explain her conduct. The team issued minutes of this meeting. The minutes show that the team decided to recommend Amy's termination, based on two factors. The first was her violation of the leave policy regarding personal leave and personal days off. The second factor was a finding that she lied to the team, when she told Kuras that she was covered for the week.

The team's minutes reflect concern about her honesty, growing out of two incidents which did not directly impact on the recommendation. These were her failure to notify her M-team representative that she did not intend to be at the team meeting on October 4. A further incident discussed in the minutes was her failure to report her late arrival at work on September 21. The minutes concluded as follows:

> These issues are presently being addressed by the team and although they do not directly impact this situation, the team feels that these situations are another example of Amy's continued disregard for team and plant policies.

Amy's team sent its termination recommendation to the ORB. The ORB rejected the recommendation after finding the evidence insufficient to warrant termination. The team received the ORB's determination and began to look for more evidence to support termination. However, some of the team members had second thoughts about terminating Amy. After a lengthy meeting, the team decided to draw up a so-called contract. I find from plant manager Raymond's uncontradicted testimony that a contract is a disciplinary agreement which obligates an employee who has repeatedly engaged in misconduct to refrain from that behavior for a specified period under the threat of more severe punishment if he or she violates the agreement.

During the team's deliberation, Dave Steinman and John Williams, both admitted supervisors, urged termination. I find from Eonn Pence's undisputed testimony that the two supervisors argued, in substance, that there was enough information to justify Amy's termination. They went on to state that they did not understand why the the team was keeping Amy around when she had caused dissension. They advised the team that it was "time to cut your losses and terminate her." However, according to Pence's credited testimony, I find that he and Facilitator Pete Kuras continued to draft a contract for Amy.

On completing their contract draft, Pence and Kuras showed it to M-team members Steinman and Andriano. After the two supervisors had an opportunity to review the contract, Steinman told Pence and Kuras: "There is enough information here indicating you guys have lost trust in her. We want you to take the documentation back to the ORB along with your orginal recommendation and see what happens." Pence followed Steinman's instructions.

Pence returned to the ORB with additional documentation and the recommendation of termination. The ORB adopted the recommendation and sent it to M-team for final approval. Andriano contacted Amy and instructed her to report to his office on October 14. When she arrived in Andriano's office on that date, Production Manager Scott West was there to greet Amy. West told Amy that she was being terminated pursuant to her team's and the ORB's recommendation because she was not "a team player." Andriano and employee Lyla Crosly escorted Amy to the plant parking lot. Andriano watched as Amy drove off.[22]

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[20] My findings regarding Amy Wickensheimer's absence during the week of October 4 are based on her and Pete Kuras' testimony. Where their testimony differed as to their conversation on Wednesday, October 5, I have credited Kuras, who seemed to have a firmer recollection of what was said. Kuras also impressed me as being more conscienteous about providing a full account of that conversation.

[21] According to Amy, Terrell told her that Fred [Andriano] had said that her misconduct was "job abandonment." However, there was no evidence that Andriano or any other supervisor influenced the team's decision to suspend Amy. My finding that the team recommended that Amy be suspended is based on team member Eonn Pence's uncontradicted testimony. The record shows that Herrell implemented that recommendation.

[22] My findings regarding the processing of Amy's discharge through the team and the ORB are based on Pence's uncontradicted testimony. My findings regarding Amy's termination on October 14, are based on her uncontradicted testimony.

2. Analysis and conclusions

It will be recalled that on or about March 24, Edy removed Amy from membership on the ORB because of her union activity, and thereby violated Section 8(a)(3) and (1) of the Act. I have also found above that Andriano violated Section 8(a)(1) of the Act when he expressed opposition to Amy's reinstatement to the ORB on the ground that a union supporter "cannot be a team player." These incidents show that Edy's management was sufficiently hostile toward Amy's union activity to cause it to punish her for it.

Edy's hostility toward Amy, because of her support for the Union, surfaced again in October. At that juncture, Amy's failure to attend team meetings and her absence from work provided an opportunity for further punishment. When Amy's team seemed bent on inflicting something less than termination on her, Director of Education John Williams and a fellow supervisor, Dave Steinman, reminded the team that she "caused dissention and it is time to cut your losses and terminate her." They insisted that Eonn Pence and Peter Kuras abandon the contract and urge the ORB to recommend Amy's termination. Pence's testimony makes clear that he capitulated because supervisors were pressuring him to urge the ORB to give Edy the chance to terminate Amy.

Then, on the day of her discharge, Production Manager West told Amy that she was being terminated because she was "not a team player." West's choice of words provided meaning to Williams' and Steinman's claim that Amy had "caused dissention." West's remark also reflected Andriano's earlier statement that a union supporter "cannot be a team player." This statement implied that union activity was incompatible with continued employment at Edy's Fort Wayne plant. Against this backdrop, I find that Williams and Steinman looked to Pence and the ORB as the means to rid the Fort Wayne plant of a team member who might defy Plant Manager Raymond's desire to avoid further confrontation with a union organizing drive. In short, I find that the General Counsel has made a strong showing that Amy's union activity motivated Edy's decision to terminate her on October 14.

Edy has failed to rebut the General Counsel's convincing evidence of unlawful motive. Accordingly, I find that by terminating Amy Wickensheimer on October 14 because of her union activity, Edy violated Section 8(a)(3) and (1) of the Act.

However, the General Counsel has not shown that the M-team pressured Amy's team to suspend her on October 5. Instead, I have found that Amy's team, on its own, without approval from Edy's management, suspended her on that date. I shall recommend dismissal of the allegation that Edy violated Section 8(a)(4), (3), and (1) of the Act by suspending Amy.

Nor has the General Counsel shown that Edy terminated Amy Wickensheimer because she gave testimony to the Board in the form of an affidavit, as alleged in the complaint. Therefore, I shall recommend dismissal of the allegation that her termination violated Section 8(a)(4) of the Act.

CONCLUSIONS OF LAW

1. Respondent, Dreyer's Grand Ice Cream, Inc. d/b/a Edy's Grand Ice Cream, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers Union, Local 700, a/w United Food and Commercial Workers International Union, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by:

(a) Instructing employees to quit their employment because they support the Union, United Food and Commercial Workers Union, Local 700, a/w United Food and Commercial Workers International Union, AFL–CIO, CLC.

(b) Interrogating employees about their union membership, union activities, and prounion sentiment.

(c) Telling employees that they were suspended from the ORB because of their union membership, union activities, and prounion sentiment.

(d) Telling employees that Edy did not support their return to the ORB because of their union membership, union activity, and prounion sentiment.

4. Respondent has violated Section 8(a)(3) and (1) of the Act by:

(a) Suspending employee Robert Byanski.

(b) Discharging employees Robert Byanski, Joe Troendly, Steve Leatherman, Lois Jones, and Amy Wickensheimer.

(c) Removing employees Michael Alexander, Ronald Palmer, Steve Shlater, Joe Troendly, and Amy Wickensheimer from the ORB.

5. Respondent has not violated Section 8(a)(4), (3), and (1) of the Act by issuing a disciplinary incident report to Michelle McGuire, or by suspending Amy Wickensheimer.

6. Respondent has not violated Section 8(a)(4) of the Act by discharging Amy Wickensheimer.

7. The above-unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having discriminatorily suspended employee Robert Byanski, I shall recommend that Respondent make him whole for his loss of pay, plus interest as computed in *New Horizons for the Retarded*, supra.

I shall also recommend that Respondent be required to rescind the suspension imposed upon Robert Byanski, and to remove from its files any reference to Byanski's suspension or to his unlawful discharge or to the unlawful discharges of Byanski, Troendly, Leatherman, Jones, and Wickensheimer. I shall also recomend that Respondent be required to notify these employees that it has removed the references to those unlawful adverse actions and that it will not use them against the employees in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Dreyer's Grand Ice Cream, Inc. d/b/a Edy's Grand Ice Cream, Fort Wayne, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees, suspending employees, removing employees from the Organization Review Board or otherwise discriminating against any employee for supporting United Food and Commercial Workers Union, Local 700, a/w United Food and Commercial Workers International Union, AFL–CIO, CLC, or any other union.

(b) Coercively interrogating any employee about union support, union sentiment, or union activities.

(c) Instructing employees to quit their employment because they support United Food and Commercial Workers Union, Local 700, a/w United Food and Commercial Workers International Union, AFL–CIO, CLC, or any other union.

(d) Telling employees that they have been suspended from membership on the organization review board or any other plant committee because they supported Local 700 or any other union, or that Respondent is not supporting their reinstatement to the organization review board or any other plant committee because they supported Local 700 or any other union.

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Joe Troendly, Steve Leatherman, Robert Byanski, Lois Jones, and Amy Wickensheimer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Joe Troendly, Steve Leatherman, Robert Byanski, Lois Jones, and Amy Wickensheimer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Robert Byanski and any reference to the unlawful discharges of Joe Troendly, Steve Leatherman, Lois Jones, and Amy Wickensheimer and within 3 days thereafter notify the employees in writing that this has been done and that these unlawful personnel actions will not be used against them in any way.

(d) Within 14 days from the date of this Order, issue a written announcement to the employees at its Fort Wayne plant stating that it has no objection to the election of employees Michael Alexander, Ronald Palmer, Steve Shlater, Joe Troendly, and Amy Wickensheimer to the ORB and remove from its files any reference to their unlawful removal from the ORB, and within 3 days thereafter notify the employees in writing that this has been done and that their unlawful removal from the ORB will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Fort Wayne, Indiana, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 8, 1994.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."